Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1976.

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IN THE

# Supreme Court of the United States

October Term, 1976
No. 76-71

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY,

*Petitioners,*

*vs.*

FRED L. HARTLEY,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of California.**

## BRIEF IN OPPOSITION.

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## SUBJECT INDEX

## TABLE OF AUTHORITIES CITED

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## BRIEF IN OPPOSITION.

### Jurisdiction.

Appellants invoke jurisdiction of the Supreme Court of the United States under 28 U.S.C. §1257(3) and Supreme Court Rule 19.

#### (a) Lack of Finality.

Respondent objects to the jurisdiction of the court on the grounds that the decision sought to be reviewed is not a "final judgment or decree".

> "1257. Final judgments or decrees rendered by the highest court of a State in which a decision

could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

The petitioners make the bald statement that jurisdiction is invoked under 28 U.S.C. §1257(3), but they make no showing or argument in support thereof. The failure of the petitioners to present with accuracy, brevity and clearness whatever is essential to show jurisdiction is a sufficient reason to deny the petition.

*Supreme Court Rule 23(4).*

Fred L. Hartley commenced this action for libel in the Superior Court of California, County of Los Angeles on March 27, 1974 against Paul Conrad, Los Angeles Times, Otis Chandler and Anthony Day. Prior to the taking of any depositions, submission of interrogatories or other discovery proceedings, the defendants made a motion for summary judgment contending that:

"(1) The alleged defamatory publication concerns public figures and matter of public interest and is privileged under the First and Fourteenth Amendments to the United States Constitution. The alleged defamatory publication was made in good faith and in the reasonable belief that it



was true and without knowledge of its alleged falsity and without reckless disregard of its truth or falsity. Such constitutional privilege provides a complete defense to the action; and therefore the action has no merit and there are no triable issues of fact.

"(2) The alleged defamatory publication is not defamatory, no cause of action has been stated against any defendant and therefore the action has no merit and there are no triable issues of fact." [R. 30, lines 1-12].

The motion was granted on September 27, 1974 and judgment for the defendants was entered on October 11, 1974. On February 3, 1976, in an unpublished interlocutory opinion, the California Court of Appeal held that summary judgment was improperly granted and reversed the judgment. The Supreme Court of California denied a hearing on April 22, 1976 (Petition, Appendix B). Thus, the case is now back in the Superior Court of the County of Los Angeles pending trial. There is no final judgment or any judgment by the highest court of the State or at all.

Petitioners are unable to establish jurisdiction in the Supreme Court pursuant to 28 U.S.C. §1257(3). They are likewise unable to establish jurisdiction under the Supreme Court rulings giving the requirement of finality a practical rather than a technical construction. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Mr. Justice White's opinion in *Cox Broadcasting Corp. v. Cohn, supra* at pages 476-487 analyzes the requirement of finality as to a federal issue.

One of the most important circumstances in determining finality is whether the additional State court proceedings would decide other federal questions that might also require review by the Supreme Court at a later date (*Ibid.*, p. 477). We must therefore look at the circumstances surrounding the federal issue in the instant case. Unfortunately the petition is of little help and is actually misleading. In their opening sentence petitioners say:

> "This is a libel action involving public figures and matters of public interest." (Petition, p. 1).

The respondent has at all times asserted that he is a *private* individual [R. pp. 131-135 and 159-162] and that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) sets forth the extent of First Amendment protection.

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." (*Ibid.*, at p. 347).

The California Court of Appeal decision found it unnecessary to rule on the private individual vs. public figure issue, since it held there was an issue of fact on the alternative basis for liability, *i.e.*, whether the defamatory cartoon was published with malice in the federal sense (Petition, Appendix A, p. 8). The Court of Appeal having reversed the judgment of the Superior Court, the issue of private individual vs. public figure is open and undecided. In the intervening period this Court has decided *Time, Inc. v. Firestone*, .... U.S. ....., 47 L.Ed.2d 154 (1976) and further defined the



meaning of "public figure" for the purposes of the First and Fourteenth Amendments.

The "public figure" vs. "private individual" issue being unresolved in the State Court, there is certainly a possibility that the further proceedings might require review by the Supreme Court. Hence, there is no final judgment and piece-meal review is contrary to 28 U.S.C. §1257(3).

In those cases where the Supreme Court has relaxed the finality requirement, the State judgment has been plainly final on the federal issue. In *Cox, supra,* the Georgia Supreme Court's judgment rejected challenges under the First and Fourteenth Amendments to the state law authorizing damage suits against the press for publishing the name of a rape victim whose identity was revealed in the course of a public prosecution. The instant State judgment decides only that the cartoon in question is susceptible of a defamatory interpretation and that there is an issue of fact as to whether it was published with malice.

Jurisdiction should be rejected for lack of finality, as otherwise the Court will be examining the merits of the case before determining jurisdiction, as pointed out by Mr. Justice Rehnquist in his dissent in *Cox Broadcasting Corp. v. Cohn, supra,* pages 507-510.

The present action alleges that petitioners published a cartoon that libelled a private individual, and that it was published with knowledge of its falsity or with reckless disregard of whether it was true or false. The unreported decision of the California Court of Appeal merely gives the respondent the right to have a jury determine the issues. The interpretation of a cartoon and its subtle and not so subtle meanings is

more complex than the interpretation of an article. A sharper copy of the cartoon is included on the opposite page.

In *Goldwater v. Ginzburg* (S.D.N.Y. 1966) 261 F.Supp. 784 at 788 the District Court said, "The issue of actual malice on the part of defendants seems particularly inappropriate for disposition by summary judgment because it concerns 'motive, intent, and subjective feelings, and reactions.' *Empire Electronics Co. v. United States,* 311 F.2d 175, 180 (2nd Cir. 1962); see also Moore's Federal Practice (2d ed.) 2581. The Supreme Court has cautioned against summary judgment 'where motive and intent play leading roles.' *Poller v. Columbia Broadcasting,* 368 U.S. 464, 474 (1962)."

In *Time, Inc. v. Ragano* (5th Cir. 1970) 427 F.2d 219 the Court of Appeal affirmed an order denying a motion for summary judgment in a case in which Time had published a picture of seven men including the plaintiff, an attorney, and referred to the group as "top Cosa Nostra hoodlums." The Court said at page 221:

> "In view of the principle that all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment, e.g. *United States v. Diebold, Inc.* (1962) 369 U.S. 654 . . . we think that a genuine issue of material fact exists. . . ."

**(b) Sound Judicial Discretion Calls for a Denial of Jurisdiction.**

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor." *Supreme Court Rule* 19(1).


Federal government diverts 500,000 barrels of Union crude oil from Southern California to Guam.—News item

Sound judicial discretion calls for a denial of jurisdiction because the decision of the State Court is not contrary to the decisions of the Supreme Court. Harmonious state-federal relations are enhanced when this Court rejects review of a State court's decision on matters of peculiarly local concern.

The petitioners are asking the Supreme Court of the United States to rule, as a matter of law, that they are entitled to summary judgment. In order to justly consider such a request, this Court would have to review all of the evidence before the trial court, the serious objections raised under the California law as to the admissibility of large quantities of the evidence [R. 162, line 16 to 165, line 6 and see discussion below under Questions Presented], the California law of defamation, and possible interpretations of the subject cartoon by reasonable viewers.

The petition fails to demonstrate any reasons why this Court should undertake such a task that more fittingly belongs in a trial court.

The unpublished interlocutory opinion of the Court of Appeal applies existing decisions to the particular facts of this case.[1] It does not purport to decide any question that would seriously erode freedom of the press under the First Amendment.[2]

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[1]Rule 977 of California Rules of Court provides that an unpublished opinion shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel.

[2]*Cf. Stone, Warden v. Powell,* .... U.S. .... (July 6, 1976, 74-1055) where it was held that Federal exclusionary rules on search and seizure claims cannot be raised in federal court review of state convictions. In footnote 31 at page 24 of Slip Opinion the Court said:

(This footnote is continued on next page)

The petition for writ of certiorari should be denied for lack of jurisdiction.

**Questions Presented.**

Respondent disputes petitioners' recitation under Questions Presented. At page 2 of their petition, petitioners say:

> "On December 20, 1973 petitioner Los Angeles Times ('The Times') published an editorial cartoon expressing an opinion sharply critical of the apparent indifference of Union and respondent Fred L. Hartley, Union's president ('Hartley') to the plight of Los Angeles, created by the diversion of the tanker and their unexplained failure to take any steps to mitigate the loss suffered by Los Angeles as a result of the diversion."

This recitation is inaccurate in stating (1) that the cartoon was an expression of opinion, and (2) in attributing to the respondent an apparent indifference to the plight of Los Angeles.

The meaning and intent of a cartoon is less precise than that of an article and this makes more difficult the delineation of what is fact and what is opinion.[3]

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"Resort to habeas corpus especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include '(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.' *Scheckloth v. Bustamonte* 412 U.S. at 259 (Powell, J. concurring)."

[3]"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust and wide-open debate on public issues." *Gertz v. Robert Welch, Inc., supra,* at 339-40.



In opposition to the motion for summary judgment, respondent filed a declaration by Donald Goodenow, managing editor of the Los Angeles Herald-Examiner, containing a copy of his editorial published on the day after the cartoon was published. It read:

"UNFAIR ATTACK"

> "There is no excuse for such irresponsible journalism as exemplified by a vicious editorial cartoon which appeared in the Los Angeles Times yesterday.
>
> "For some cloudy minds, it obviously is open season to attack industry, particularly the oil industry, regardless of truth. The cartoon in question implied that an oil company's president was responsible for diverting 500,000 barrels of oil from Southern California to Guam.
>
> "The truth: the U.S. government ordered the oil sent there, not the oil company. It was diverted for Military use.
>
> "There are many problems in the so-called fuel crisis, but we never will solve them with distorted accusations and twisted reasoning and vitriolic attacks against our business leaders.
>
> "This is the time for clear heads and cool action. Let's encourage leadership, not bury it in the muck of enervating vendettas." [R. pp. 151-153].

The California Court of Appeal stated the rule that if more than one meaning could be derived by the

average reader, a question is presented for the jury's determination. It further found that it was reasonable to conclude that a substantial number of viewers of the cartoon might construe it to portray respondent as having some causal[4] relationship to the governmental diversion order (as the editor of the Herald-Examiner did). It then said,

> "Such a charge is not a mere opinion, but rather a statement of fact." (Petition, Appendix A, p. 7).

Petitioner's attempt to categorize the cartoon as an opinion attributing to the respondent an apparent indifference in the plight of Los Angeles is unsound. The Court of Appeal pointed out that there was no basis for assuming that the average reader would have known the background matters nor for assuming that such a reader would give to the cartoon such a non-libelous interpretation (Petition, Appendix A, p. 5).

The determination of whether a publication is one of fact or opinion is a question of law to be decided by the Court after looking at the nature and context of the communication as a whole.

> *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596 (July 23, 1976).

The California Court of Appeal having ruled that the cartoon contained a statement of fact, it is misleading for petitioners to refer to it as an expression of opinion.

In addition to disputing the prefatory statement under the heading of Questions Presented, respondent contends

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[4]There is a significant typographical error at page 6 of Appendix A to petition where the word "casual" is printed rather than "causal" as used by the Court of Appeal.



that petitioners' specific statement of questions is inadequate.

If the Court accepts jurisdiction, the issues are:

1. Was there an issue of material fact as to whether the respondent, Fred L. Hartley, was a private or public figure?
2. Was there an issue of material fact as to whether the cartoon was published with knowledge of its falsity or with reckless disregard of whether it was true or false?
3. Was the subject cartoon susceptible of a defamatory interpretation by the average reader?

**Constitutional Provisions Involved.**

In addition to the First and Fourteenth Amendments, United States Constitution, the Seventh Amendment is involved:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be re-examined in any court of the United States, other than according to the rules of the common law." (U.S. Const., Amendment VII).

**Statement of the Case.**

Respondent objects to petitioners' Statement of the Case (Petition, 4-9) in its entirety and asks that it be stricken. As previously noted, this is an action by respondent Fred Hartley against cartoonist Paul Conrad, *et al.*, for an allegedly defamatory cartoon drawn by Conrad and published in the Los Angeles Times on December 20, 1973. The petitioners made a motion for summary judgment pursuant to *California*

*Code of Civil Procedure,* Section 437c, on the grounds of constitutional privilege and claimed that Hartley was a public figure and that the cartoon was published without malice and was not defamatory. The trial court granted the motion for summary judgment and the Court of Appeal reversed.

There has been no discovery, no trial and there are no findings of fact. The reversal of the summary judgment makes the trial court ruling a total nullity. It is indeed presumptuous, if not downright misleading, to attempt a recitation of facts as petitioners do.

California law imposes stringent requirements before granting the drastic relief of summary judgment, which denies a litigant the right to a trial. *California Code of Civil Procedure,* Section 437c provides in part:

> "Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[5]

The documentation relied upon by the trial court must consist of competent evidence, irrespective of whether objection is made thereto.

> *Dugar v. Happy Tiger Records, Inc.,* 41 Cal. App.3d 811, 815, 817 (1974).

Objections were made in the instant case [R. 162, line 16 to 165, line 6].

The declaration of petitioner Anthony Day consisted of 59 pages, including 21 exhibits of copies of articles published in the Los Angeles Times and written by at least twelve different staff writers [R. 67 to 126].

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[5]The full text of Section 437c is set forth in Appendix A to this brief.



It is apparent that although the declaration of petitioner Day recites:

> "I have personal knowledge of the facts stated herein and if sworn as a witness could competently testify thereto." [R. 67, lines 12-13],

his declaration contradicts this. The declaration conclusively shows that it is hearsay by incorporating the articles of the twelve different staff writers of the Los Angeles Times, which articles are themselves based on hearsay.[6] The Day declaration does not satisfy the requirement of *Code of Civil Procedure Section 437c* that the declaration "shall show affirmatively that the affiant is competent to testify to the matters stated therein."

> *Keniston v. American Nat. Ins. Co.,* 31 Cal. App.3d 803, 813 (1973).

Petitioners are attempting to usurp the function of the jury and elevate their contentions to the status of facts. They are not entitled to do this.

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[6]The efforts of Day to incorporate reporter Lee Dye's slanted version of the "Oil Caper" story of December 19, 1973 [Day declaration, R. 72, lines 15-29 and Ex. 16, p. 108] which in turn cedits unidentified "various sources and spokesmen," show that the contents of the articles were not within the personal knowledge of Day, the declarant, or even that of Lee Dye, the reporter.

## REASONS FOR DENYING THE WRIT.

### POINT I.

**There Was an Issue of Material Fact as to Whether the Respondent, Fred L. Hartley, Was a Private or Public Figure.**

Petitioners contended that Fred Hartley was a public figure and that the publication of the defamatory cartoon was protected by the constitutional privilege. Respondent contended that he was not a public figure, but a private individual entitled to be protected from libelous publications. The California Court of Appeal held that there was an issue of fact as to whether the cartoon had been published with reckless disregard of whether it was true or false. Since this alternative basis of liability necessitated a reversal of the summary judgment, the Court of Appeal found it unnecessary to rule on whether there was an issue of fact with regard to respondent's status as a private figure.

The Supreme Court should deny the petition for writ of certiorari, since to grant it would involve this Court in having to make evidentiary rulings on declarations and other evidence offered in the trial court below.

The entire effort of the petitioners to show that Hartley was a public figure was based on articles in their own newspaper from "various sources and spokesmen," the competency of which was challenged. (See discussion above under "Statement of the Case.")

The determination of whether Hartley is a private or public figure should be determined in a trial court where the evidence can be fully developed, its competency tested, and the recent elucidation by the Supreme



Court in *Time, Inc. v. Firestone, supra,* at page 5 of Slip Opinion applied.

To do less than this would jeopardize the respondent's constitutional right to a jury trial. (United States Constitution, Amendments VII and XIV.)

*Jacob v. New York,* 315 U.S. 752, 62 S.Ct. 854 (1941).

Principles applicable to summary judgment motions generally, are applicable to such motions when made in a defamation action. *Goldwater v. Ginzburg, supra; Time, Inc. v. Ragano, supra; Rinaldi v. Village Voice, Inc.,* 45 A.D. 2d 180, 365 N.Y.S.2d 199, *cert. den.,* 423 U.S. 883, 96 S.Ct. 153, 46 L.Ed. 112 (1975); *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.,* 43 Ohio App. 2d 105, 334 N.E.2d 494, *cert. den.,* 423 U.S. 883, 96 S.Ct. 151, 46 L.Ed.2d 111 (1975). *Goldwater* further held that upon such a motion in a defamation case, as in all other actions, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion.

### POINT II.

**There Was an Issue of Fact as to Whether the Cartoon Was Published With Knowledge That It Was False or With Reckless Disregard of Whether It Was True or False.**

The defendants' attempt to show good faith in publishing the cartoon does no more than raise a possible issue for determination by the jury. They admit that they at all times knew the government diverted the oil tanker. This alone raises a triable issue of knowledge of falsity dependent upon the interpretation of the cartoon by the average reader.

There was evidence to raise an issue of fact as to whether the defamatory cartoon was published with knowledge of its falsity or reckless disregard of its truth or falsity.

It is apparent that the editor of the Los Angeles Herald-Examiner interpreted the cartoon as implying that Hartley was responsible for the oil diversion. (See quotation of editorial, *supra,* under Questions Presented.)

As a result of the publication of the subject cartoon the Board of Directors of the Los Angeles Chamber of Commerce unanimously adopted the following resolution:

> "'The Board of Directors of the Los Angeles Area Chamber of Commerce deplores the personal attack on a prominent business leader and a major employer in the Los Angeles area, carried in the Conrad cartoon.
>
> "Solutions to the great issues of our time will come from the concerns, imagination and initiative of the business leadership working in concert with the government. Personal attacks such as carried in this cartoon of the Times are a part of the problem and contribute nothing to solutions." [R. pp. 148-149].

Mr. Justice Compton of the California Court of Appeal, has expressed the opinion that Conrad's cartoons amount to highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

Justice Compton in his concurring opinion in *Yorty v. Chandler* (1970) 13 Cal.App.3d 467 at p. 479, referring to the defendant Paul Conrad said:



> "The protection of the freedom of a responsible press does not require that we insulate from liability for libel the artists whose pens drip venom and whose skill in drawing and cartooning far exceeds their sense of responsibility, respect for the truth and the depth of their understanding of public issues."

Defendants cannot excuse their conduct by saying they did not intend to charge Hartley with being responsible for the oil diversion. In *Montadon v. Triangle Publications* (1975) 45 Cal.App.3d 938 (Cert. denied, U.S. Supreme Court, October 6, 1975) the Court affirmed a libel judgment based on an article that resulted in a false impression of Miss Montadon's status and said at page 949:

> "While this result was apparently not intentional, it was one which those responsible should have foreseen and one which showed a reckless disregard for the truth or falsity of the statement."

Miss Montadon was a public figure and the Court held there was ample proof of malice to satisfy the constitutional requirement.

The grave danger of a court depriving a litigant of his constitutional right to a jury trial in a libel action was noted and corrected by the Ninth Circuit Court of Appeal in *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (1975) (Cert. denied, U.S. Supreme Court, Nov. 3, 1975). The trial judge in *Alioto* had taken the question of actual malice from the jury and granted a judgment n.o.v. for defendant. The Court of Appeal reversed.

## POINT III.

**The Cartoon Was Susceptible of a Defamatory Interpretation by the Average Reader.**

In their Point I petitioners argue that no reasonably informed reader could have believed other than that the federal government was responsible for the diversion of the oil tanker. This is an absurd contention in view of the unanimous ruling of the Court of Appeal that the cartoon was susceptible of a defamatory interpretation (and the denial of a hearing by the California Supreme Court). The clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language may be held liable.

> *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 551 (1959)

It would certainly seem that if that many appellate judges could construe the cartoon as being defamatory, it is impossible for the petitioners to establish that there is no issue of fact for a jury to determine.

Respondent filed a declaration by Donald Goodenow, managing editor of the Los Angeles Herald-Examiner in opposition to the motion for summary judgment. A copy of Mr. Goodenow's editorial published the day after the cartoon was published is quoted above at page ..... The editorial said in part:

> "The cartoon in question implied that an oil company's president was responsible for diverting 500,000 barrels of oil from Southern California to Guam."

At a minimum, this evidence effectively refutes petitioners' contention that no reasonably informed reader



could have believed other than that the federal government was responsible for the oil diversion.

Under the temper of the times and contemporary public opinion, a substantial number of viewers of the cartoon might construe it to portray appellant as having some causal relationship to the governmental diversion order.

The rule of law is that it is for the trier of fact to determine whether a publication is defamatory, unless there can be only one reasonable interpretation of the cartoon, and that interpretation is non-libelous.

> *Yorty v. Chandler*, 13 Cal.App.3d 467, 475 (1970);
>
> *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 546 (1959);
>
> *Mellon v. Times Mirror*, 167 Cal. 587, 592 (1914).

The publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.

> *MacLeod v. Tribune Publishing Co. supra*, at 547.

The test is whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory.

> *Patton v. Royal Industries, Inc.*, 263 Cal.App.2d 760, 765;
>
> *Mullins v. Brando*, 13 Cal.App.3d 409, 415 (1970).

The purpose of allowing the plaintiff to have a jury trial is to determine the effect of the cartoon

on the average reader. One can hypothesize interminably on this, but it is sufficient at this point that the cartoon be susceptible of a defamatory meaning. The defendants come squarely within the definition of the "clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language."

**Conclusion.**

The petition for writ of certiorari should be denied because there has been no final judgment by the highest court of the State of California. The petitioners are asking the United States Supreme Court to rule as a matter of law that respondent Hartley is a public figure and that the cartoon was not published with a reckless disregard of the truth. They ask the Supreme Court to do this even though the evidence has not been developed and tested for admissibility.

In the cases since *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964) the Supreme Court has sought to balance the Constitutional protection of the press with the protection of one's name. It is unrealistic to suggest that the present action has resulted in the slightest timidity or chilling of the petitioners. The respondent should be allowed to proceed with the trial of the case on its merits.

Respectfully submitted,

FRANK J. KANNE, JR.,
*Attorney for Respondent*
*Fred L. Hartley.*

## APPENDIX A.

### California Code of Civil Procedure, § 437c.

§ 437c. [Summary proceedings on claim that action or defense is unmeritorious: Motion: Support of motion: Procedure on motion: Judgment: Appeal] Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. The motion may be made at any time after 60 days has elapsed from the general appearance in the action or proceeding of, each party against whom the motion is directed. Notice of the motion and supporting papers shall be served on the other party to the action at least 10 days before the time fixed for the hearing. The filing of such motion shall not extend the time within which a party must otherwise file a responsive pleading.

The motion shall be supported or opposed by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken.

Such motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the admissible evidence set forth in the papers and all inferences reasonably deducible from such evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from such evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact; or where a material fact is an individual's state of mind, or lack thereof, and such fact is sought to be established solely by the individual's affirmation thereof.

If it appears that the proof supports the granting of such motion as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that such issues are without substantial controversy. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

If it appears from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as may be just.



If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting such affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused such other party to incur.

Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of such action, but the final judgment in such action shall, but the final judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the summary proceeding herein provided for.

A summary judgment entered under this section is an appealable judgment as in other cases.